IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 349 of 2002

For Approval and Signature:

HON'BLE MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

GANPATLAL MOHANLAL VISHNOY

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 349 of 2002

MR BA SURTI for Petitioner No. 1

MR I M PANDYA APP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE C.K.BUCH

Date of decision: 26/02/2004

ORAL JUDGEMENT

1. Heard Mr. B.A.Surti learned counsel for the appellant and Mr. I.M.Pandya learned APP for the respondent State.

2. Present appeal is preferred against the order of conviction and sentence passed by the learned Special Judge, Banaskantha at Palanpur while concluding the trial of Special Case No.45 of 2001 on 14.2.2002.

3. As per the case of prosecution, the appellant accused was found in conscious possession of opium of 150 gms. inclusive of a small polyethylene bag in which it was carryied. As per the law the opium found from the possession of the appellant-accused was more than the small quantity {prescribed under the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as the NDPS Act)} but less than the commercial quantity {prescribed under the NDPS Act) and therefore, he has been held guilty for the offence punishable under section 18(c) of the said Act.

4. The learned counsel for the parties have taken me through the reasons assigned by the learned Trial Judge for holding the appellant-accused guilty and imposing sentence for a period of five years and a fine of Rs.25,000/-. It is submitted by Mr. Surti that the amount of fine has been paid by the accused. TheTrial Court should verify the statement and payment made.

5. In response to the query raised by the court, Mr. Surti has fairly accepted that he would not press the appeal so far as the conviction recorded by the learned Special Judge is concerned, but according to him, the punishment imposed by the learned Trial Judge is very harsh and considering the value of the opium found, the weight of it and the age of the accused, the learned Trial Judge, ought not to have inflicted punishment of not more than 3 years.

6. After recording the conviction, when the accused was asked to place his submission on the quantum of punishment, it was specifically pointed out by the appellant accused that on the date of the alleged incident, he was a young boy of 16-1/2 years and therefore, he would be entitled to probation as per section 33 of the NDPS Act. It is not necessary to reproduce section 33 of the NDPS Act. But it begins with non-obstante clause. So ignoring section 360 of Cr.P.C. and other provisions of the Probation of Offenders' Act, the accused, if he is of below 18 years of age, on conviction he can be granted benefit of probation so that he can improve his life.

7. Looking to the entire scheme of the Act and the

reasonable basis thereof, the Trial Court has come to the conclusion that the young age of the victim can put him in an advantageous position and therefore, the learned Trial Judge has made all efforts to ascertain the correct age of the victim.

8. I have gone through the reasons assigned by the learned Trial Judge whereby he has refused to accept that on the date of the incident, the accused was below 18 years of age. I am also not convinced looking to the nature of evidence produced by the accused and the stand taken by him that he was below 18 years of age especially when (i) he himself has accepted that he was aged about 20 years when he was first apprehended by the police and the police has recorded the same age of 20 years in the register which is popularly known as "Charan Nisan Patrak' (ii) he was examined by doctor and it is recorded by the doctor that the appellant-accused was of 19 years of age approximately when examined. So it will be difficult for the court to accept even today that on the date of the incident he was younger than 18 years. This fact was even considered by the learned Trial Judge while imposing rigorous imprisonment to the accused. But when the opinion of the doctor or other convincing evidence is available on record that he was 19 years of age, difference of a year or two is very relevant. If the scheme of section 33 is considered, there is clear flavour of victimology in the scheme. So the case of teenagers upto 18-19 or even 20 years. Such a plea, if taken needs to be dealt with sensitivity, keeping in mind other facts and socio economic background of the convict. In the present case the accused was not found with large or commercial quantity of opium.

9. In most parts of our country, Bhang (hemp), ganja, opium etc. are used as psychotropic substances traditionally. But it seems that in this sociological background, small quantity and commercial quantity of such psychotropic substances have been fixed in the table accordingly i.e. somewhat on higher side. So the total quantity of such psychotropic substances found while committing offences can be considered relevant while awarding the quantum of punishment, in the background of other relevant aspects.

10. But while imposing penalty or substantive sentence, this aspect can be reasonably looked into and therefore, the submission advanced by Mr. Surti is found acceptable that when the appellant accused is in jail and he has undergone imprisonment of 3 years, the quantum of punishment can be reduced to a period of 3 years i.e.

the period of sentence already undergone-without altering the amount of fine imposed by the learned Trial Judge and paid by the accused.

11. Learned APP Mr. Pandya has not pressed for further detailed reasons, when Mr. Surti has not argued the appeal on merits and that too on the point of conviction recorded by the learned Trial Judge. Therefore, it is not necessary to go into further detailed discussion.

12. For the aforesaid reasons, the appeal is partly allowed. The conviction recorded by the learned Trial Judge is upheld. However, the sentence is reduced to 3 (three) years without altering the fine imposed by the Trial Court. If the accused has already completed the imprisonment of three years, then he should be set at liberty, if he is not otherwise, required for any other offences.

(C.K.Buch-J)

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